United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-1435

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To be argued by
JOHN TIMBERS

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-1435

UNITED STATES OF AMERICA,

Appellee,

—v.—

LAM LEK CHONG, a/k/a "JIMMY LAM", YUK CHOI CHUNG, a/k/a "DAVID CHAN", and FRANCISCO LI GANOZA,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Lam Lek Chong (hereinafter "Jimmy Lam"), Yuk Choi Chung (hereinafter "David Chan") and Francisco Li Ganoza appeal from judgments of conviction entered in the United States District Court for the Southern District of New York on December 18, 1975, after a four-week trial before the Honorable Charles H. Tenney, United States District Judge, and a jury.

Indictment 74 Cr. 846, filed on August 29, 1974 contained two counts and charged, in Count One, that defendants Jimmy Lam, David Chan and Francisco Li Ganoza, and "others to the Grand Jury unknown", conspired (a) to violate various of the federal narcotics laws, 21 U.S.C. §§ 812, 841(a)(1), 841(b)(1)(A), 951

(a)(1), 952(a), 960(a)(1) and 960(b)(1); and (b) to import heroin into the United States from Hong Kong and to distribute the same; all in violation of sections 846 and 963 of Title 21, United States Code. Count Two charged that on May 30, 1974 Francisco Li Ganoza distributed approximately one and one-half pounds of heroin in violation of section 841 of Title 21, United States Code and section 2 of Title 18, United States Code.

Trial commenced on October 14, 1975 and concluded on November 11, 1975 when the jury found all three defendants guilty on Count One. The jury was unable to reach a verdict on Count Two, as to which a mistrial was declared.

On December 18, 1975 Judge Tenney sentenced Lam to eight years' imprisonment, to be followed by three years' special parole.* Chan was sentenced to five years' imprisonment, the execution of all but three months of which was suspended, to be followed by a four year and nine month period of special parole. Li Ganoza was sentenced to seven years' imprisonment, to be followed by three years' special parole.

Chan is presently enlarged on bail pending this appeal. Lam and Li Ganoza are serving their sentences.

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* Judge Tenney ordered that Lam's period of confinement be served concurrently with a fifteen-year term of imprisonment imposed on Lam by the New York State Supreme Court prior to the trial herein. The state sentence was the result of Lam's conviction after a trial for the very same May 30, 1974 sale of heroin with which Li Ganoza was charged in Count Two of the instant indictment.

Statement of Facts

A. The Government's Case

At trial the Government proved, through numerous tape recordings, the testimony of two undercover New York City Policemen who were posing as narcotics customers, and other evidence, that, starting in January 1974, these three defendants, and others, conspired, generally, to import heroin into the United States and there to distribute that and other heroin. In specific part, the Government proved that the defendants conspired to obtain in Hong Kong and to smuggle into the United States one hundred pounds of heroin, and, thereafter, to distribute in the United States one and one-half pounds of heroin. To carry out this plan the defendants had numerous meetings in New York, and travelled to Hong Kong where they had further meetings and where Jimmy Lam negotiated to obtain heroin from Hong Kong sources. However, the plan fell through when the undercover agents refused to advance "front money". Back in the United States defendants Jimmy Lam and Francisco Li Ganoza continued to negotiate with the undercover officers to whom, on May 30, 1974, they sold one and one-half pounds of heroin.

Jimmy Lam was the proprietor of a Chinatown travel agency, Oriental Travel Consultants; David Chan was President of an import-export business, Mei Lin Trading Company, which operated in Reston, Virginia, Hong Kong, and Europe; and Francisco Li Ganoza, who was in the restaurant business, had recently sold his share in a New York City restaurant.

Negotiations about importing one hundred pounds of heroin from Hong Kong began on January 24, 1974, when Jimmy Lam was introduced to Frank Mingo, an undercover New York City Police Officer who was posing as a pimp and hustler. Officer Mingo told Lam that he was

interested in purchasing large amounts of heroin (Tr. 151).* At this meeting Lam negotiated to sell Mingo one pound of heroin for $28,000. During the negotiations Lam suggested that if Mingo were interested in purchasing substantial amounts of heroin, he should get the heroin in Hong Kong where it could be obtained for $2,000 to $3,000 a pound—much cheaper than the New York price. Lam suggested several methods for bringing heroin back to the United States from Hong Kong (Tr. 153).

As a result of this meeting, in the early morning hours on January 30, 1974, three of Lam's associates—Chong Yin Hee, a/k/a "Mike"; Lim King Sing, a/k/a "Fatman"; and Yeo Chin Nee, a/k/a "Sonny"—sold Officer Mingo and New York City Police Detective Herbert Wright one and one-half pounds of heroin for $42,000. The sale, together with preliminary negotiations, took place in Manhattan—at the Skyline Hotel on 52nd Street and Ninth Avenue, in Chinatown, and outside the Dixie Hotel, near Times Square. Although the undercover officers had negotiated with Jimmy Lam to buy one pound of heroin for $28,000, "Mike", "Fatman", and "Sonny" appeared with one and one-half pounds of heroin and insisted on selling it for $42,000. Mingo and Wright agreed to buy the one and one-half pounds, and promised that they would pay the additional $14,000 shortly (Tr. 338, 340-41, 346, 580-83).

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* References to pages of the trial transcript are abbreviated herein as "Tr."; references to pages of the transcript of pre-trial, proceedings, which in some cases duplicate the numbers on pages of the trial transcript, are abbreviated as "PTr."; references to Government Exhibits are abbreviated as "GX". Defense Exhibits are designated by the names of the respective defendants.

Later on January 30, 1974, Lam met with Mingo and Wright to discuss the one and one-half pound deal. During this meeting Lam said that a friend had recently asked him to bring one pound of heroin back from Hong Kong, but that Lam had told the friend that, if he was going to take the chance, he would just as soon smuggle forty pounds (Tr. 172, 341-44, 504, 585).

Lam and the customers met frequently during February 1974 (Tr. 346-56). The first meetings concerned payment for the January 30, 1974 sale (Tr. 173-75). When payment was completed, discussion turned to obtaining a large amount of heroin in Hong Kong. Lam frequently used code words during these discussions (Tr. 170, 353, 354) and told Mingo and Wright that he did not want to discuss plans over the telephone, because the telephone might be tapped. Lam also told the officers that he did not want to meet them in public places because a meeting of two black men and a Chinese man might raise suspicions.

At a series of meetings in New York City hotel rooms in late February, March, and April 1974, Lam and the customers agreed to travel to Hong Kong where Lam would obtain one hundred pounds of heroin and smuggle the same back into the United States with the help of his acquaintance, David Chan, who would secrete the heroin in cans of soybean sauce and ship it by boat back to Virginia, using his import-export company.

Meetings in New York City hotel rooms that were selected by the undercover officers were recorded through a recording device secreted in the hotel room, often in a telephone. Most telephone calls, in which the undercover officers participated, were also recorded. Also, an authorized wiretap was placed on one telephone at Oriental Travel Consultants, Jimmy Lam's place of business, during the first two weeks of March 1974. No recordings were made of conversations between the un-

dercover agents and the defendants in hotel rooms selected by the defendants, in public places, in automobiles, or in Hong Kong. Altogether, approximately one hundred fifty conversations—mostly between Jimmy Lam and the undercover officers—were recorded during the investigation of this case.

At a meeting on February 22, 1974, Lam told Officer Mingo and Detective Wright that he had sent a man to Hong Kong to start setting up the deal (Tr. 177). Two days later, on February 24, 1974, Li Ganoza arrived in Hong Kong. Li Ganoza left Hong Kong on March 7, 1974 (GX 41).

At a hotel meeting on March 12, 1974, Lam introduced David Chan to Mingo and Wright. Lam explained that he and Chan had stayed up late the preceding night discussing how to get heroin in Hong Kong and bring it back to the United States. Lam explained that he and Chan had some questions for the officers. An extended discussion followed about how the heroin would be shipped back to the United States and how the defendants and undercover officers would get the payment money to Hong Kong. Chan said that he was concerned that the Hong Kong heroin source would cheat the defendants and officers by selling them bad heroin. Chan also suggested that, in order to prevent a rip-off, wherein the Hong Kong heroin source would steal the heroin back from Chan's import-export business, the source should be told to deliver the heroin to a hotel room and not be told that the heroin was going to be shipped to the United States (GX 3-B).

On March 19, 1974 Lam and Chan again met with the undercover officers. Lam opened this meeting by telling officers that they should get passports for the trip to Hong Kong. Another discussion about how to obtain heroin and smuggle it back to the United States followed.

Chan suggested, as a safety precaution, that decoy shipments of sauce cans that did not contain heroin be shipped to New York and Brooklyn at the same time that the sauce cans containing heroin were shipped to Virginia. Chan—after expressing several reservations about the project and asking, "in case we are caught is there any way we can get out of it?" (GX 4-B at 63)—said (in Chinese), "Tell him definitely I'll do it. Definitely do it one time" (GX 4-B at 73). It was agreed that Chan would leave for Hong Kong shortly thereafter to make preliminary arrangements (Tr. 219-20; GX 4-B).* Numerous other meetings and telephone conversations about the Hong Kong project took place between Lam and the undercover officers during this period.

In late March 1974 David Chan travelled to Hong Kong. Jimmy Lam and Francisco Li Ganoza made the trip separately, both around April 12, 1974. Officers Wright and Mingo followed shortly thereafter (Tr. 278). Before leaving, Lam told the officers that he was taking Li Ganoza to Hong Kong because Li Ganoza was related to a Hong Kong heroin source and could help the group obtain heroin (GX 6-A). The officers told the defendants that they had a boss, named Johnny, from whom they took orders (Tr. 208-09). They told the defendants that Johnny accompanied them to Hong Kong. In fact, there was no such person as Johnny.

In Hong Kong, Lam and Chan both met with and telephoned Officers Mingo and Wright on several occasions. The first Hong Kong meeting among the four occurred in a hotel room on April 18, 1974. Lam said that he was negotiating with the Hong Kong connection for a lower price and that the transfer of the heroin would take

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* For the most part, Chan spoke Chinese at these two meetings and Lam translated. However, Chan did speak English for parts of both conversations (see *infra* at 48n). An application for a United States Immigrant Visa and Alien Registration, on which David Chan had stated that he could speak English was received in evidence as GX 40.

place with David Chan's brother and Officer Wright in a room of a second or third class Hong Kong hotel. The heroin would be delivered to that room where Detective Wright would test it. If Wright found the heroin satisfactory he would telephone another hotel room where Lam and Officer Mingo would be waiting. Upon Wright's advice that the heroin was satisfactory, Mingo would pay Lam. During this meeting Lam said that he would require $10,000 to $15,000 from the undercover officers for machines to seal the cans of purported soybean sauce (Tr. 646-48).

After a series of telephone conversations and meetings, Lam and Chan again met with the officers in a hotel room on Saturday, April 20, 1974. Wright and Mingo said that they would not pay $10,000 to $15,000 until they actually saw the narcotics. Lam replied that he would try to arrange the deal anyway.

In a series of telephone calls later on Saturday, April 20, 1974, Lam said that the deal could take place the next day, Sunday, April 21 (Tr. 656-57). Wright told Lam that since his bank had closed earlier in the day, he could not get his money until Monday. Lam called back to say that the transaction would take place on Monday, April 22, 1974, at 4:00 p.m.

On Sunday, April 21, 1974, Lam came to Mingo's and Wright's hotel room. Lam gave Wright a Kent cigarette package which, Lam said, contained a sample of the heroin that the officers would be receiving. A marquis test for heroin, conducted by Detective Wright, showed that the brown-rock substance inside the cigarette package was heroin (Tr. 670-75). Lam said that his connection would supply the one hundred pounds of heroin in three installments and that the first installment would be ten pounds. The price would be $4,600 per pound (Tr. 676).

In the afternoon of April 22, 1974, Lam called the officers and told them that he was having trouble reaching agreement with the connection on a place to deliver the first ten pounds of heroin. A few hours later, Lam came to the officers' hotel room and told them that the heroin would be delivered to Officer Wright in Room 319 at the Sun Ya Hotel. Francisco Li Ganoza, would also be present in Room 319 when the heroin was delivered. Officer Wright volunteered that, after he saw the ten pounds of heroin in Room 319, he would pay Lam $20,000 for his expenses and make an advance payment for the second installment of the heroin (Tr. 679).

Two hours later, Lam telephoned Detective Wright and told him that the connection was demanding an advance payment of $7,000 for delivery of the first ten pounds of heroin. Wright said that he would not pay any money until he saw the heroin.

Twenty minutes later Lam and Li Ganoza arrived at the officers' hotel room. Lam introduced Li Ganoza as the connection's nephew and said that Li Ganoza was the man Lam had sent to Hong Kong from the United States. Lam said that he and Li Ganoza had convinced the source to accept an advance payment of $5,000. Detective Wright responded that his fictitious boss, Johnny, refused to pay any money before seeing the heroin. However, Detective Wright said that he would try to convince Johnny to advance $5,000. Lam said that he would do the deal that night, if Officer Wright could convince Johnny to make an advance payment before 10:00 p.m. Otherwise the deal would take place the next day (Tr. 691).

The next morning, April 23, 1974, Chan telephoned Officer Mingo and said that Lam was angry that the deal did not go down the preceding night, because everything had been set (Tr. 321). The same morning Lam tele-

phoned Detective Wright and advised him to be careful. Lam said that Chan and Li Ganoza had been followed the night before (Tr. 692). Lam said that he would call back later in the day.

At this point the deal fell through. The undercover officers, who had not been able to obtain the $5,000 in "front money" sought by Lam, checked out of their hotel (Tr. 322, 693). The defendants, who had observed surveillance agents following them the night before, left Hong Kong immediately upon learning that the undercover officers had suddenly checked out of their hotel.

Back in the United States, Lam and Li Ganoza negotiated to sell more heroin to Mingo and Wright. At an unrecorded meeting with Detective Wright in New York City on May 7, 1974, Lam said that he thought one heroin source with whom he had been dealing in Hong Kong had notified law enforcement authorities about the deal when Lam said that he would not purchase any heroin from that source (Tr. 708-09). Lam said that the second source, who was prepared to deliver all one hundred pounds of heroin, was now angry with Lam and Chan, because they had cancelled the one hundred pound order at the last minute; that Li Ganoza was this source's nephew; and that this source sometimes sent packages containing five or six pounds of heroin from Hong Kong through the mail to Li Ganoza (Tr. 709-12).

For several days after the May 7 meeting, Lam attempted to arrange a heroin sale to the undercover agents through Sonny, one of his associates in the narcotics business and one of the men who had supplied the heroin purchased by the undercover officers on January 30, 1974 (Tr. 724-34). When this deal fell through, Lam turned to arranging a sale of heroin to be supplied by Li Ganoza. For the next two weeks Lam had daily telephone calls and meetings with the undercover officers about this sale. At

one point, Lam told the officers that the source, from whom Li Ganoza was getting the heroin, had gone to Boston. Shortly thereafter, Li Ganoza spoke over the telephone and confirmed to the officers, in halting English, that his source had gone to Boston. A few days after this call, Li Ganoza obtained one and one-half pounds of heroin. On May 30, 1974, this heroin was placed in a wastebasket in Li Ganoza's New York City apartment. While Li Ganoza watched from the street outside his apartment, Lam took Officer Mingo upstairs to Li Ganoza's apartment, used keys to let Mingo into the apartment, removed the heroin from the wastebasket, and gave it to Mingo. Then Lam and Mingo went downstairs to get the payment money that Mingo said was in his car. As the two left the building, Lam was arrested. Thereafter Li Ganoza, who was observing from nearby, was also arrested (Tr. 1131-37).

B. The Defense Case

Defendant Lam called Kevin Daly, a New York City Police Detective, who testified that from March 3 to March 12 or 14, 1974 an authorized wiretap was in effect from 9:00 a.m. to 9:00 p.m. on one of the telephones at Jimmy Lam's Chinatown business, Oriental Travel Consultants. Detective Daly further testified that during the time of the wiretap, no telephone calls to Hong Kong were made from that telephone and that the officers monitoring the wiretap did not overhear any English-language drug-related conversations (Tr. 1360-1373). A notebook belonging to Lam and containing entries for the year 1974 was introduced into evidence. Entries in this notebook contained words that the Government had contended were code words for heroin terms, which had been used by Lam over the telephone (Lam Exhibit G). A stipulation was also introduced, showing that a Swiss bank account, mentioned by Lam during one of

the recorded conversations, contained only a small balance.

Unlike his co-defendants, defendant David Chan testified on his own behalf. Chan testified that he was president of an import-export business. He said that he had known, and purchased airline tickets from, Jimmy Lam since 1973, and that the ticket for his March 1974 trip to Hong Kong had been purchased from Lam back in February 1974. Chan said that, after Lam asked him if he would like to make a lot of money by helping two men import heroin from Hong Kong, Chan attended the March 12, and 19, 1974 hotel meetings with Jimmy Lam and the undercover officers. Chan said that he had suspected that Mingo and Wright were law enforcement officers and claimed that at these two meetings he did not agree to import one hundred pounds of heroin. He admitted, however, that he did agree to explore the matter further when he travelled to Hong Kong in March 1974.

Chan testified that, after he arrived in Hong Kong, he telephoned Lam and told Lam that he did not want to do the deal. Shortly thereafter, when Lam arrived in Hong Kong with the two undercover officers, Chan protested (Tr. 1468). However, when Lam said that he did not plan to sell heroin but only defraud the officers of money, Chan agreed to accompany Lam to the officers' Hong Kong hotel room on three occasions. Chan denied making any telephone calls to the officers while in Hong Kong. Chan claimed that he left Hong Kong on May 26, 1974 on previously-planned business and said that he did not see Lam again until after he was arrested, when he returned to the United States in August 1974. Several character witnesses testified on Chan's behalf.

Defendant Li Ganoza introduced a copy of a Hong Kong marriage certificate that showed that he had been married in Hong Kong on February 26, 1974 (Li Ganoza Exhibit B). Stephen Singer, an immigration lawyer, testified that on May 21, 1974 Li Ganoza signed a Petition to the Immigration and Naturalization Service for his wife to enter the country. Mr. Singer mailed the petition to the Immigration and Naturalization Service on June 5, 1974 (Tr. 1429-41).

ARGUMENT

POINT I

The indictment charged, and the evidence overwhelmingly established, but a single conspiracy, an integral part of which was the May 30, 1974 distribution of heroin charged in Count Two. Accordingly, the District Court correctly denied defendants' motions to sever Count Two. Any failure to give a multiple conspiracies' charge was harmless error on the facts of this case.

Claiming multiple conspiracies and failure to sever Count Two from the trial of Count One, the defendants assert that the evidence of the heroin sales made on January 30 and May 30, 1974 was improperly admitted on the conspiracy charge (Lam Brief at 12-31; Chan Brief at 36-40; and Li Ganoza Brief at 14-15). However, evidence of both sales were properly received since both were part of the conspiracy. In addition, evidence of the January 30, 1974 sale, was admissible to show the background and development of the conspiracy which was inextricably intertwined with the start of the Hong Kong negotiations. Evidence relating to the May 30, 1974 sale was admissible on the additional ground that it showed that Lam's intent during the Hong Kong trip was to

import and distribute heroin and not to defraud the undercover officers as he claimed.

A. Count One of the indictment charged a single conspiracy, one of whose several objects was the May 30, 1974 distribution of heroin by Lam and Li Ganoza.

The conspiracy alleged and proved at trial was one which included within its ambit the January 30 and May 30, 1974 sales of heroin as well as the negotiations to obtain, smuggle out of Hong Kong, and distribute in the United States, one hundred pounds of heroin. Defendants claim in error that the indictment charged only a conspiracy to import and distribute heroin obtained in Hong Kong, and that therefore the conspiracy did not include the May 30, 1974 sale. The first paragraph of the conspiracy charge set forth in Count One alleges that the defendants conspired to violate specified sections of the federal narcotics laws, including section 841 (illegal distribution) and section 960 (illegal importation). Defendants wholly ignore this paragraph in their briefs. The second paragraph, on which defendants focus and purport to rely, alleges that "it was *part* of said conspiracy" (emphasis added) to import large quantities of heroin into the United States and to distribute that heroin in the United States. Even if one were to assume, *arguendo*, that there was no proof that the heroin sold on May 30, 1974 came from Hong Kong,* the conspiracy

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* In fact, there was substantial evidence from which the jury could conclude that the heroin sold on May 30, 1974 came from Hong Kong. Jimmy Lam's several statements to the undercover officers that Franicsco Li Ganoza was the supplier of the May 30, 1974 heroin were corroborated by the circumstances of that sale, which took place inside Francisco Li Ganoza's apartment while Li Ganoza was watching from the street outside. There

[Footnote continued on following page]

broadly alleged in the first paragraph of Count One included the May 30, 1974 sale—a sale which occurred within the temporal boundaries of the charged conspiracy and which was effected by two of the three defendants. In support of their limited construction of the indictment's allegations, defendants also point to the overt acts listed in Count One, all of which relate solely to events that occurred prior to the abortion of the Hong Kong deal. It is settled, however, that in charging a conspiracy, an indictment need not allege each and every act committed by the conspirators in furtherance of the conspiracy which the Government intends to prove at trial. *Wong Tai* v. *United States*, 273 U.S. 77, 81 (1927); *United States* v. *Cohen*, 518 F.2d 727, 733 (2d Cir. 1975); *United States* v. *Koss*, 506 F.2d 1103 (2d Cir. 1974), *cert. denied*, 421 U.S. 911 (1975).

Here, moreover, defendants can hardly allege that they lacked sufficient pre-trial notice that the character of the alleged conspiracy included both the Hong Kong negotiations and the May 30, 1974 sale. The Assistant United States Attorney in charge of the case explained the full scope of the conspiracy, including the May 30, 1974 sale, when he responded to the defendants' pre-trial motions to sever (PTr. 11, 13-14, 24-25, 27, 35-37). Also, as Judge Tenney noted during argument of the defendants' motions (PTr. 10), allegation of a May 30, 1974 heroin sale (Count Two) in the same indictment as a

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was evidence that Li Ganoza obtained his heroin in Hong Kong. Li Ganoza's uncle was one of the two heroin suppliers with whom Jimmy Lam negotiated in Hong Kong. On May 7, 1974, Lam told Detective Wright that the uncle sometimes sent packages containing five or six pounds of heroin through the mail from Hong Kong to Li Ganoza. The jury could properly have concluded from this evidence that the May 30, 1974 heroin supplied by Li Ganoza came from Hong Kong.

conspiracy that allegedly ran from January 1 to August 29, 1974 (Count One) must have suggested to the defendants that the Government was claiming that the May 30, 1974 sale was a part of the conspiracy charged.

Nor was there any reason for the trial court to grant a severance of Count Two by reason of the proof adduced at trial. The Government's proof of a single conspiracy that included the May 30 sale was overwhelming: Lam and Li Ganoza participated in both the Hong Kong and the May 30, 1974 transactions; on both occasions Lam handled negotiations with the customers; the customers, Mingo and Wright, were the same in Hong Kong and on May 30, 1974; on both occasions Li Ganoza was Lam's contact with the heroin suppliers; on both occasions the transaction was to take place in a room associated with Li Ganoza;* and negotiations leading to the May 30, 1974 sale began with a May 7, 1974 meeting at which Lam and Detective Wright discussed what had gone wrong in Hong Kong.

Given the forgoing, the court acted well within its discretion when it refused to sever Count Two from Count One. *United States* v. *Cohen*, 518 F.2d 727, 736 (2d Cir. 1975); *United States* v. *Koss*, 506 F.2d 1103, 1114 (2d Cir. 1974), *cert. denied*, 421 U.S. 911 (1975); *United States* v. *Sperling*, 506 F.2d 1323, 1342 (2d Cir. 1974), *cert. denied sub. nom. Serrano* v. *United States*, 421 U.S. 949 (1975).

Furthermore, even accepting, *arguendo*, defendants' contention that the Hong Kong and May 30, 1974 transactions were not part of the same conspiracy, the proof

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* In Hong Kong the transaction was to take place in Room 319 of the San Ya Hotel with Li Ganoza present. On May 30, 1974 the transaction took place in Li Ganoza's apartment, with Li Ganoza absent.

sketched in the preceding paragraph was sufficient to justify joinder of the offenses pursuant to Rule 8 of the Federal Rules of Criminal Procedure.

Finally, even if severance of Count Two were required, the Government would have been entitled to prove the May 30, 1974 sale and the negotiations leading up to it at any trial that limited the Count One conspiracy to the Hong Kong negotiations. Since Lam alternately claimed that he travelled to Hong Kong to defraud the officers and because he was afraid that they would harm him if he reneged on his promise to sell them heroin, the fact that Lam voluntarily initiated a different and successful heroin sale when he returned to New York was highly probative of Lam's intent to traffic in narcotics during the trip to Hong Kong. Furthermore, evidence of the May 30, 1974 sale effected by Lam and Li Ganoza and the preceding negotiations, during which Lam frequently talked about Li Ganoza, was probative of the criminal character and purpose of the relationship between Lam and Li Ganoza during the Hong Kong trip.

B. The Government proved the single conspiracy charged. Although defendants may have been entitled to a multiple conspiracies charge on whether certain unindicted co-conspirators were also members of the conspiracy, failure to give that charge was harmless error on the facts of this case.

The Government's theory of conspiracy, as supported by the evidence at trial and spelled out in its Bill of Particulars (Record on Appeal, Government's Bill of Particulars), summation to the jury (Tr. 1616-1620) and argument to the court in opposition to defendants' motion to strike testimony about unindicted co-conspirators (Tr.

1323-25, 1327-32, 1336-37), was that Jimmy Lam was a narcotics middleman who arranged repeated and substantial sales of heroin, supplied by sources he contacted in Chinatown, to purchasers he contacted through his travel business. Francisco Li Ganoza was one of those sources. The unindicted co-conspirators, Fatman, Sonny and Mike, were other sources. All of Lam's transactions were substantial—ranging from one to one hundred pounds of heroin—and recurring. Together with the unindicted co-conspirators, Lam arranged or attempted to arrange heroin sales on January 30, and in early May 1974. Together with Francisco Li Ganoza, Lam attempted the Hong Kong and May 30, 1974 heroin transactions. In addition, there was evidence from which the jury could properly find that Lam and Li Ganoza had worked together on other substantial heroin deals. Lam, for example, was intimately familiar with the procedure whereby, on several occasions, Lam's uncle had mailed packages containing five or six pounds of heroin to Li Ganoza at addresses where Li Ganoza did not live, but which he had selected. On at least one occasion Lam discussed heroin transactions involving the unindicted co-conspirators in David Chan's presence.

While some of the suppliers like Li Ganoza may not have known the identity of other suppliers, like Fatman, Sonny and Mike, that fact is not fatal to proof of the single conspiracy. The inference was justified that each seller knew his supplies were only a small part of the heroin that Lam and his associates acquired and redistributed. *See United States* v. *Bynum*, 485 F.2d 490, 497 (2d Cir. 1973), *vacated and remanded on other grounds*, 417 U.S. 903 (1974). *See also United States* v. *Ortega-Alvarez*, 506 F.2d 455, 457 (2d Cir. 1974), *cert. denied sub nom.*, *Figueroa* v. *United States*, 421

U.S. 910 (1975); *United States* v. *Capra*, 501 F.2d 267 (2d Cir. 1974), *cert. denied*, 420 U.S. 990 (1975); *United States* v. *Mallah*, 503 F.2d 971, 983-84 (2d Cir. 1974), *cert. denied*, 420 U.S. 995 (1975). Given the large amounts of heroin transferred, and those agreed to be transferred, and the large amounts of money received by the suppliers with whom Lam dealt, there can be little doubt that Lam was "conducting a regular business on a steady basis with numerous suppliers who intentionally and knowingly were either looking to or maintaining a close relationship with a solvent, on-going apparatus." *United States* v. *Bynum*, *supra*, 485 F.2d at 497.

Defendants Lam and Li Ganoza complain of the court's refusal to give a multiple conspiracies' charge. Their claim is that the January 30, 1974, Hong Kong, and May 30, 1974 transactions were part of different conspiracies (Lam Brief at 21; Li Ganoza Brief at 14-16). Judge Tenney denied their request at trial because he saw no evidence of multiple conspiracies (Tr. 1606). As to the Hong Kong and May 30, 1974 transactions, he was clearly correct. As already pointed out herein, *supra* at 16, the Government proved at trial that Lam and Li Ganoza participated in both the Hong Kong and May 30, 1974 transactions; that on both occasions it was Lam who handled negotiations with the customers; that the customers, Mingo and Wright, were the same in Hong Kong and on May 30, 1974; that Li Ganoza was Lam's contact with the heroin suppliers; that on both occasions the transaction was to take place in a room associated with Li Ganoza; and that the negotiations leading to the May 30, 1974 sale began with a May 7, 1974 meeting at which Lam and Detective Wright discussed what had gone wrong in Hong Kong.

As to ths January 30, 1974 sale and the other unconsummated transactions involving unindicted co-conspirators Chong Yin Hee, a/k/a "Mike", Lim King Sing, a/k/a "Fatman" and Yeo Chin Nee, a/k/a "Sonny", a

multiple conspiracies' charge was technically appropriate and probably should have been given. The absence of an appropriate charge, however, could in no way have prejudiced the defendants since the limited evidence adduced relating to the unindicted co-conspirators in no way implicated defendants and was, in any event, fully admissible—even in the event of a finding that the unindicted co-conspirators were not members of the conspiracy charged in the indictment—because probative of the background, development and operation of the conspiracy and of the lack of merit in Lam's defenses of entrapment and absence of specific intent.

It is clear, first of all, that the requests to charge on this issue submitted by defendants (Record on Appeal, Lam Request to Charge No. 17 and Li Ganoza Request to Charge No. 24) were legally in error and correctly rejected by the District Court. *United States* v. *Leonard*, 524 F.2d 1076, 1084 (2d Cir. 1975); *Southern Ry Co.* v. *Jones*, 228 F.2d 203, 213 (6th Cir. 1955); and *Shaw* v. *Lauritzen*, 428 F.2d 247, 250 (3d Cir. 1970). As Judge Friendly recently wrote in *Leonard*, *supra* (at 1084):

> "Although lawyers seem never to learn the lesson, it is elementary that to put a trial court in error for declining to grant a requested charge, the proferred instructions must be accurate in every respect."

The defendants' request were incorrect because they asked the court to give an "all-or-nothing" multiple conspiracies' charge—one requiring the jury to acquit if it found that the proof established more than one conspiracy. Since there was overwhelming proof that defendants were members of at least the conspiracy alleged in the indictment, the only charge to which they were

entitled was that approved by this Court in *United States* v. *Tramunti*, 513 F.2d 1087, 1107 (2d Cir.), *cert. denied*, — U.S. — (1975).*

The absence of such a charge here was clearly harmless since the evidence adduced relating to the unindicted co-conspirators' activities could not have had any prejudicial spill-over effect on the three defendants. *United States* v. *Miley*, 513 F.2d 1191, 1209 (2d Cir.), *cert. denied*, — U.S. — (1975). The three unindicted co-conspirators did not make damaging hearsay declarations about defendants and, indeed, defendants do not claim that any such declarations were received in evidence. Nor was any defendant a minor participant in a conspiracy who was forced to sit through weeks of damaging evidence against the three unindicted co-conspirators. In fact, the unindicted co-conspirators' involvement was peripheral and the overwhelming majority of the trial evidence concerned the three defendants. The prosecutor's summation, reflecting this fact, paid little or no attention to the evidence relating to the unindicted co-conspirators. Also, the defendants' scheme

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* The *Tramunti* charge provided in pertinent part (513 F.2d at 1107):

> "Proof of several separate conspiracies is not proof of the single, overall conspiracy charged in the indictment *unless one of the several conspiracies which is proved is the single conspiracy which the indictment charges.* What you must do is determine whether the conspiracy charged in the indictment existed between two or more conspirators. If you find that no such conspiracy existed, then you must acquit. However, if you are satisfied that such a conspiracy existed, you must determine who were the members of that conspiracy.
>
> "If you find that a particular defendant is a member of another conspiracy, not the one charged in the indictment, then you must acquit that defendant. In other words, to find a defendant guilty you must find that he was a member of the conspiracy charged in the indictment and not some other conspiracy." (Emphasis added.)

to obtain and distribute one hundred pounds of heroin was a more serious offense than the amounts of heroin (*i.e.*, five pounds or less) that the three unindicted co-conspirators sold and sought to sell. Finally, we do not have, in the words of Judge Friendly's recent opinion in *Miley*, *supra* at 1209:

> "[A] case in which, for instance, 36 persons in eight separate conspiracies were prosecuted in a trial in which one defendant could be swept along with others, where [t]he dangers of transference of guilt from one to another across the line separating conspiracies, subconscious or otherwise, are so great that no one really can say prejudice to substantial right has not taken place. *Kotteakos* v. *United States* 328 U.S. 750, 174 (1946)."

In addition, the evidence of the unindicted co-conspirators' conduct was admissible wholly apart from whether that conduct could properly be said to be a part of, or in furtherance of, the single conspiracy charged. Defendants' principal complaint, for example, regarding the receipt of evidence pertaining to the January 30, 1974 sale of heroin by the unindicted co-conspirators to the undercover agents is misguided. Evidence of that sale was properly received if only to show the background and development of the conspiracy. *United States* v. *Torres*, 519 F.2d 723, 727 (2d Cir. 1975); *United States* v. *Cioffi*, 493 F.2d 1111, 1115 (2d Cir.), *cert. denied*, 419 U.S. 917 (1974); *United States* v. *Cohen*, 489 F.2d 945 (2d Cir. 1973). This sale was inextricably intertwined with the start of the Hong Kong negotiations and it would have been impossible for the jury to follow these negotiations without reference to the January 30, 1974 sale.

Thus, on January 24, 1974, when Lam was first introduced to Mingo and the two discussed the sale of heroin that subsequently occurred on January 30, 1974, Lam also suggested, for the first time, that Mingo go to

Hong Kong to purchase large amounts of heroin. Then, when Lam met with the undercover officers on January 30, 1974 to discuss the sale that had taken place earlier that day, Lam told the officers that a friend had recently asked him to bring one pound of heroin back from Hong Kong, but that Lam had told the friend that if he, Lam, was going to take that risk he would just as soon bring back forty pounds all at once. Discussions about the Hong Kong trip continued between Lam and the undercover officers during February 1974 while the undercover officers, Mingo and Wright, were paying for the heroin that they had received on January 30, 1974. Testimony about these early Hong Kong negotiations would have been incomplete and difficult for the jury to follow without passing reference to the January 30, 1974 sale, which was the main business discussed at these early meetings and, in fact, was the reason that these early meetings took place.*

Finally, evidence of the January 30, 1974 sale and of the related statements by Lam, as well as the evidence of Lam and Sonny's efforts to sell two or three pounds of heroin to the undercover officers in early May 1974—shortly after the Hong Kong trip—was admissible even if not part of the single conspiracy charge as tending to rebut Lam's defenses of entrapment and lack of specific intent. *See generally, United States* v. *Papadakis*, 510 F.2d 287, 294 (2d Cir.), *cert. denied*, 421 U.S. 950 (1975); *United States* v. *Gerry*, 515 F.2d 130, 140-141 (2d Cir.), *cert. denied* (1975); *United States* v. *Deaton*, 381 F.2d 114, 117 (2d Cir. 1967).

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* The Government's proof did not stress the January 30, 1974 sale. The heroin sold on January 30, 1974 was not offered into evidence, and the direct testimony of Officer Mingo, the first undercover officer to testify, only mentioned that the sale had taken place without describing it (Tr. 166-168). However, after defense counsel extensively cross-examined Mingo about this sale (Tr. 338, 340-341), Detective Wright described the sale in slightly greater detail (Tr. 580-583).

POINT II

The trial court's charge on the objectives of the conspiracy was entirely correct.

Lam contends that the trial court erred when it declined his oral request, first uttered after the completion of the Court's charge, that the jury be instructed that if it concluded that the defendants had conspired only to defraud the agents it must acquit (Lam Brief at 23-26). The contention is frivolous. The jury was fully and properly instructed that to convict it had to find beyond a reasonable doubt, *inter alia*, that the defendants had conspired to do one or more of the narcotics-related objectives set forth in Count One. Furthermore, Lam's requested instruction was properly denied because it was untimely and not in writing.

With respect to the objectives of the conspiracy, the trial court charged the jury:

> "Now, the indictment alleges that the conspiracy was to import, to distribute and to possess with intent to distribute heroin, which, as I have stated, is a Schedule I narcotic drug controlled substance. The Government's proof may, but need not, establish all of these objectives of the conspiracy. If you find that the agreement had as its object any one of these unlawful activities, then you may be satisfied that the existence of the conspiracy is established" (Tr. 1763).

By virtue of the foregoing and the respective summations of Lam's counsel and the prosecutor (Tr. 1623-24, 1637-57, 1732-38), *see United States* v. *Kahaner*, 317 F.2d 459, 477 (2d Cir.), *cert. denied*, 375 U.S. 835 (1963), the jury was made plainly and unmistakably aware that if it credited Lam's theory of the case—namely, that he had engaged in a conspiracy only to bilk the agents—

it was required to acquit him of the narcotics conspiracy charged in Count One. Lam's current contention otherwise is frivolous.

Moreover, Lam's claim, wholly apart from its lack of substantive merit, must fail because Lam did not make the request until after the conclusion of the Court's charge. This Court has said that:

> "such an oral request made after the conclusion of the charge was too late under F. R. Crim. Proc. 30—a rule grounded both on the danger of error inherent in the necessarily rapid consideration of an oral request at such a time and on the possibly undue impact of a separate charge devoted to a single fact or theory." *United States* v. *Kahaner*, *supra*, 317 F.2d at 477.

Accord, *United States* v. *Strassman*, 241 F.2d 784, 786 (2d Cir. 1957); *Lewis* v. *United States*, 153 F.2d 724, 726 (8th Cir. 1946); and *Affronti* v. *United States*, 145 F.2d 3, 9 (8th Cir. 1944).

POINT III

There was no prosecutorial misconduct during this four-week trial.

Defendants assert a miscellany of alleged instances of prosecutorial misconduct. We deem it unnecessary to respond to the large number of those claims that are patently frivolous—*e.g.*, that the prosecutor improperly interjected the issue of race into the case, that he employed "scare tactics", that his objections to various questions propounded by defense counsel were improper and

prejudicial, etc. (Li Ganoza Brief at 16-24 *passim*). The remainder of the claims, which are likewise without merit, are treated hereinafter *seriatim*.

A. It was not reversible error for the prosecutor to pose two questions during David Chan's cross-examination that Chan never answered.

Defendants Lam (Lam Brief at 31-38) and Chan (Chan Brief at 24-30) challenge two questions that the prosecutor asked Chan during cross-examination. Both questions were withdrawn without answers. However, the defendants claim that the mere posing of the questions constituted reversible error.

The defendants' briefs confuse the two questions and misstate the facts and circumstances surrounding each. Accordingly, this brief will discuss the two questions separately in the order in which they were posed.

1. Question: "Did Jimmy Lam tell you that a person named Han Ng was to be his source of supply for the heroin?"

Jimmy Lam is the only defendant who challenges this question (Lam Brief at 35-37).* Although the Court overruled an objection to this question (Tr. 1555), the Government withdrew the question and it was never answered (Tr. 1555).

Nonetheless, Lam contends that the mere posing of the question constituted reversible error because a written summary of an August 20, 1974 Drug Enforcement Administration ("D.E.A.") interview of Chan, on which

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* The question was asked at Tr. 1551.

the question was based, had not previously been turned over to Chan's counsel.*

After David Chan was arrested on August 20, 1974 he made an oral statement at the D.E.A. offices that was thereafter summarized in writing by D.E.A. Agent John Gartland (Court Exhibit 3). The next morning Chan made a similar oral statement in the office of Assistant United States Attorney James Nesland. Mr. Nesland prepared a written summary of this statement (Court Exhibit 1).

When the challenged question was posed the prosecutor believed that the D.E.A. case agent had turned over the Gartland summary to defense counsel (Tr. 1868-69, 1926). In fact, it now appears that the summary had not been turned over. When the prosecutor first learned of this possible failure, he immediately withdrew the question.

The Government's failure to produce the statement was inadvertent. Prior to, and during, trial the Government produced to the defendants on several occasions agency reports, defendants' statements, transcripts and translations of recorded conversations, Jencks Act materials, and other materials that, placed one on top of

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* In addition, Lam also makes two factually incorrect claims. The first incorrect claim is that the statement was made under privileged circumstances. In fact, it was not made under privileged circumstances. Chan made the statement to D.E.A. agents after his arrest and after having been advised of his constitutional rights. Lam is apparently confusing this statement with the statement discussed *infra*, pp. 29-32.

Lam's second factually incorrect claim is that this statement was made in violation of directives previously given by the Court (Lam Brief at 35). Review of the cited pages (*i.e.*, Tr. 1551-61) —all of which follow the challenged question—shows that this assertion is also wrong.

another, were nearly one foot high. When the challenged question was asked, Government counsel assumed in error that the Gartland summary was included in the mass of materials that had previously been produced. At the completion of trial the Court conducted an evidentiary hearing at which it inquired about the Government's basis for asking this question (Tr. 1855-1930). The Court concluded that there was no prejudice or impropriety in the question" (Tr. 1923).*

It should also be noted that defendant Chan, the only party entitled to his own statement under Rule 16(a)(1) of the Federal Rules of Criminal Procedure, does not complain of the Government's negligent failure to produce the summary.** The only party who does complain, defendant Lam, was not entitled to receive the summary and has no standing to raise this point on appeal.

However, even if the point had been raised by defendant Chan, it would have no merit. The Government's question was never answered. The question, standing by itself, fell far short of being sufficiently prejudicial to require reversal. Chan could not successfully claim for example, that if he had known about the Gartland summary, he would not have testified on his own behalf. In *United States* v. *Johnson*, 525 F.2d 999 (2d Cir. 1975), this Court rejected a claim far stronger than any that Chan might make. In *Johnson* the Government did not produce a written summary of one of the defendant's post-arrest statements. Although the Gov-

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* The transcript of this hearing was sealed by the District Court.

** Chan's brief does mention that the statement was not produced (Chan Brief at 27) in connection with another point. However, he does not claim to have been prejudiced by the Government's failure to produce the statement.

ernment did not use the summary during its direct case, some of the Government's questions during the defendant's cross-examination were based on the summary. When the defendant denied having made certain of the statements recorded in the summary, the Agent who summarized the defendant's statements took the stand, and testified about what the defendant had earlier told him. On appeal Johnson claimed that he would not have testified in his own behalf if the summary had been produced before he took the stand. This Court rejected Johnson's argument because Johnson had made three other similar statements, which he knew about when he took the stand. Given *Johnson*, the instant case is *a fortiori*. As in *Johnson*, there was nothing in the challenged summary that would have caused Chan to decide not to testify. Shortly after making the questioned statement, Chan made a similar statement to Assistant United States Attorney Nesland, a summary of which the Government produced before Chan testified. The only respect in which the questioned summary differed from the one that was produced was in reporting that Chan had said that Lam's Hong Kong source was Han Ng. Although this observation implicated Lam, it cannot have affected Chan's decision to testify. In addition, here, unlike *Johnson*, no questions about the unproduced summary were answered, and an agent was not called to testify about Chan's statement.

2. Question: "Mr. Chung, did you tell Agent Gartland after you were arrested that in Hong Kong Jimmy Lam had been dealing with two different groups that were supplying heroin?"

This unanswered question is challenged by defendants Lam (Lam Brief at 36-37) and Chan (Chan Brief at 24).* David Chan refused to answer the question. After a conference out of the jury's hearing the Court directed

* The question was asked at Tr. 1560.

the jury to "wipe any answer or any of those questions" about what happened after Chan's arrest "out of your minds" (Tr. 1571). The Court also instructed the jury that Chan "was well within his rights in refusing to answer the question" (Tr. 1571). On its part, the Government withdrew the question (Tr. 1572).

After a post-trial hearing the Court determined that there was "no prejudice or impropriety in the question" (Tr. 1923).

There was nothing improper about this unanswered question. The Government's withdrawal of the question before it was answered, and the Court's over-generous corrective instructions to the jury make the claim on appeal frivolous.

Chan claims that the mere posing of the question is reversible error because (1) the Government did not turn over the Chan statement on which the question was based, as required by Rule 16(a)(1) of the Federal Rules of Criminal Procedure (Chan Brief at 24-26); and (2) Chan was deprived of his right to counsel when he made the statement (Chan Brief at 26).

Review of the circumstances under which Chan made the underlying statement demonstrates the baseless nature of these claims. The basis for the question was an off-hand statement that Chan had made to Special Agent John Gartland after Chan's arrest, and while Chan was cooperating with the D.E.A. At the time Chan was arrested, and before his arraignment, Chan agreed to cooperate with the D.E.A. (Tr. 1873). At arraignment Chan's counsel—upon observing Chan talking to Special Agent Gartland—separated Chan and the agent (Tr. 1859, 1884). Chan's counsel said nothing future about contact between his client and the D.E.A. (Tr. 1859, 1900), apparently because Chan had not told his counsel about his decision to cooperate (Tr. 1915). Thereafter, Chan voluntarily, and on his own initiative, met with

D.E.A. agents, including Special Agent Gartland, and cooperated with them (Tr. 1859, 1886, and 1910). The agents advised Chan not to say anything to them about the case on which he had been arrested (Tr. 1888). However, after one undercover transaction, Chan blurted out that the undercover transaction in which he had just participated was like what happened in Hong Kong, where Jimmy Lam dealt with two different groups that were supplying heroin (Tr. 1889-90). The Government did not make a written record of the statement (Tr. 1890-96).*

This oral statement did not come to the attention of Government counsel until after the trial had started (Tr. 1893). Government counsel immediately told Chan's counsel about the statement (Tr. 1566), and advised that the Government might use the statement at trial (Tr. 1559). Knowing this, Chan's counsel still made no motion to suppress the statement. Thereafter, the Government posed the challenged question. When objections were raised, the Government withdrew the question before receiving an answer.

The question was entirely unobjectionable. Chan's counsel was informed of the substance of the underlying statement as soon as Government counsel learned of it, and long before the question was posed. Chan was not deprived of counsel since he made the statement in a non-custodial situation after voluntarily appearing at the D.E.A. offices. In addition, even if there were substance to any of Chan's claims, he was not harmed by the posing of the unanswered question—particularly in view of the Court's careful and extensive corrective instructions.

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* The assertion at pages 27-28 of Chan's Brief that this statement by Chan is recorded in an August 21, 1974 D.E.A. report is incorrect.

B. The Government's effort to advise jurors not to speculate why defendant Lam was not named in Count Two of the indictment did not prejudice Lam and was, in any even, immediately remedied by the Court's curative instruction.

Defendants Lam (Lam's Brief at 32-34) and LiGanoza (Li Ganoza's Brief at 17) complain about a portion of the Government's opening statement that dealt with the fact that defendant Lam was not named in Count Two of the indictment. After the challenged Government remark the Court immediately told the jury to disregard what the prosecutor had said (Tr. 52). In its charge, the Court directed the jury not to speculate about how the Government chose who to name in the indictment (Tr. 1792-1793).*

Since it was Lam who actually made the heroin sale charged in Count Two and since it was Lam who con-

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* That pertinent portion of the trial transcript of the Government's opening statement reads as follows (Tr. 52-53):

> "Mr. Timbers: . . . From my description of the May 30th sale of a pound and a half of heroin it may have occurred to some of you that although the indictment only charges Francisco Li Ganoza with making that sale, the government could have also charged Jimmy Lam."
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> "Mr. Corriero: Objection, if your Honor please."
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> * * * * *
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> "The Court: I would suggest that the jury disregard that remark."
>
> "Mr. Timbers: Your Honor, I simply wanted to tell the jury they should not speculate."
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> * * * * *
>
> "Mr. Timbers: Will the Court charge the jury that they should not speculate as to why Jimmy Lam is not charged in the count. That is the only point I wanted to make."
>
> "The Court: Yes, that is the time when the point should be made, not now."

ducted the negotiations leading up to the May 30 sale, the Government anticipated that jurors would speculate why only Li Ganoza, whose participation was much less extensive, and not Lam, had not been charged in Count Two.* Accordingly, in its opening statement, the Government intended to tell the jurors that they should not speculate about the point (Tr. 52).

While the prosecution might have been better advised to have left this cautionary instruction to the province of the Court, no prejudice could possibly have ensued. The Government's statement of the law was correct, and in accordance with the instructions later given by the Court (Tr. 1792-93). Nor was defendant Lam improperly prejudiced by the challenged statement. Since the Government had just finished describing its anticipated proof at trial, which showed Lam's substantial participation in the May 30 sale, the jury was aware of Lam's extensive involvement in the transaction charged in Count Two. In any event, any conceivable prejudice harm that may have been caused by the prosecutor's statement was remedied by the Court's curative instruction (Tr. 52) and subsequent charge to the jury (Tr. 1792-93).

C. The Government's opening statement to the jury that there were tape recordings that the Government would not play at trial was an accurate preview of the evidence at trial and did not call upon defendants to testify.

Defendants Lam (Lam's Brief at 32-34 and 37) and Li Ganoza (Li Ganoza's Brief at 16) complain about

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* Lam was not charged in Count Two because he was charged with the May 30, 1974 sale in the state court. Of course, the prosecutor did not intend to tell the jury that Lam had been charged and convicted of the May 30, 1974 sale in the state court.

references in the Government's opening and closing statements to recordings that the undercover agents testified they had made, but that the Government would not play at trial.*

Approximately 150 of the defendants' conversations were recorded during the investigation of this case. During pre-trial proceedings the Court repeatedly encouraged the Government to pare down its proof and to play as few recordings as possible at trial (Tr. 39, 182). The Government did this.

Anticipating that the jury would be concerned when it learned that recordings of the defendants' conversations

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* The challenged portion of the Government's opening statement is set forth at Tr. 49-50:

"Mr. Timbers: I would like to make two comments about the tape recordings that you will be hearing in this case.

"First of all, more than 150 conversations were recorded during the investigation of this case. If all of these recordings were to be played during this trial you would probably be here until Christmas.

"Therefore, the government intends to play only ten to fifteen of these 150 recorded conversations.

"We believe that the recordings that we are going to play to you constitute a fair and correct sample of the conversations that took place.

"Mr. Corriero: If your Honor please, I must object to this portion, this statement with respect to how many tapes were recorded.

"Mr. Rosenthal: It is what he is going to prove.

"The Court: Yes. I wouldn't make any comment. Just limit yourself to what the government intends to prove, not what they are not going to put into evidence.

"Mr. Timbers: In any case, if the defendants should disagree that what we are playing is an accurate sample, the government has made all the tapes available to the defendants to listen to and they have the right to play them to you on their own.

"Mr. Rosenthal: I object to this. This is not a proper opening."

had been made which the Government was not playing at trial, the Government explained in its opening statement that, in order to save time, it would not play all the recordings to the jury.

Li Ganoza's counsel immediately challenged the Government to do what the Court had been asking it not to do—play all the tapes on which Li Ganoza's name was mentioned (Tr. 88).

> "Mr. Frankel: And I want the District Attorney, or the U.S. Attorney, to produce all the tapes in which Mr. Francisco Li Ganoza spoke.
>
> "I also would ask him to produce all of the tapes—there are only a few; we won't be here until Christmas, and I don't want you to feel that I'm trying to keep you here until Christmas—there are only a few tapes in which Mr. Li Ganoza's name was mentioned."

Confronted with this challenge by Li Ganoza's counsel, the Court told the Government that it should play those portions of the tapes where Li Ganoza's name was mentioned (Tr. 117). In fact, the Government only introduced and played a small portion of the recordings to the jury—although most recordings mentioning Li Ganoza's name were played. Nonetheless, the undercover agents informed the jury whenever a conversation they testified about was recorded, even if the recording was never played to the jury or otherwise put in evidence.

Li Ganoza argues that the challenged portion of the Government's opening statement amounted to a Government comment on the defendants' right to remain silent. This argument is meritless because the defendants could clearly have introduced the omitted tape recordings into evidence—through, for example, undercover agents Wright and Mingo—without the defendants themselves hav-

ing to take the stand. The Government's statement was not directed to whether the defendants would testify and did not call upon them to testify. *Compare Knowles* v. *United States*, 224 F.2d 168, 170 (10th Cir. 1955). In any event, the Court subsequently charged the jury that each defendant had a right to testify in his own behalf, or not, and the fact that a defendant did not testify should not influence the jury (Tr. 1791-1792).

Lam and Li Ganoza also argue that the Government's statement about recordings not played improperly conveyed to the jury the impression that, in addition to the evidence introduced at trial, the Government had ample corroborative evidence that would not be introduced. In fact, however, the undercover officers subsequently testified before the jury that they had made recordings which were not played to the jury (E.g., Tr. 729, 730, 732, 733). The challenged Government statement, therefore, was no more than a preview of the evidence the jury subsequently heard. In addition, the Court charged the jury to "forget" the challenged Government statement because, "(a)ny tape which is not in evidence is, of course, not to be considered by you in any manner whatsoever" (Tr. 1792).

D. The Government was entitled to cross-examine David Chan about out-of-court, post-conspiracy statements that he had made about Jimmy Lam, since Chan was subject to cross-examination by Lam's counsel.

Defendants Lam (Lam Brief at 34-35) and Li Ganoza (Li Ganoza Brief at 20-21) complain of a question put by the prosecutor to David Chan during the latter's cross-examination regarding an out-of-court, post-conspiracy statement that Chan had earlier made concerning defend-

ant Lam.* Since Chan was testifying and available for cross-examination by Lam's counsel, the Government's question to Chan was permissible under *Bruton* v. *United States*, 391 U.S. 123 (1968).

During David Chan's cross-examination, the Government asked several questions about out-of-court, post-conspiracy statements that Chan had earlier made about defendant Lam (*e.g.*, Tr. 1530, 1533). Apparently relying on *Bruton*, the Court ruled that the Government could not ask Chan about such statements (Tr. 1531, 1534). Since Chan never did answer the question cited in Lam's brief, defendants' complaint is apparently that the Government asked this question after the Court had earlier ruled that it could not ask a similar question (Tr. 1531).

It is clear, however, that the Government's questions to Chan were proper, since Chan was available for cross-examination by Lam's counsel. In *Nelson* v. *O'Neil*, 402 U.S. 622, 626-627 (1971), the Supreme Court reiterated that *Bruton* does not apply where the hearsay declarant is available for cross-examination at trial:

> "It was clear in *Bruton* that the 'confrontation' guaranteed by the Sixth and Fourteenth Amendments is confrontation *at trial*—that is, that the absence of the defendant at the time the co-defendant allegedly made the out-of-court statement is immaterial, so long as the declarant can be cross-examined on the witness stand at trial.
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> * * * * *
>
> "The Constitution as construed in *Bruton*, in other words, is violated *only* where the out-of-court

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* The challenged question was (Tr. 1533):

"Q. When you were first interviwed by Mr. Nesland did you, in fact, tell him that you had attended two meetings with Jimmy Lam and the undercover agents in New York?"

> hearsay statement is that of a declarant who is unavailable at the trial for 'full and effective' cross-examination."

Since Chan was available for cross-examination, the question of which his co-defendants complain was perfectly proper.

E. It was not improper for the Government to comment on defendant Li Ganoza's appearance during trial.

Li Ganoza complains (Li Ganoza Brief at 22) that the Government noted to the jury during summation, "you have seen Francisco Li Ganoza here in this courtroom." * Li Ganoza claims that this statement was a surreptitious attempt to cemment on LiGanoza's failure to testify. The complaint is meritless.

Although the Fifth Amendment prohibits compelling one to furnish testimony which is self-incriminating, it does not prohibit the introduction of evidence obtained through an examination of physical characteristics. *United States* v. *Wade*, 388 U.S. 218, 221-23 (1967); *see United States ex rel. Stovall* v. *Denno*, 388 U.S. 293 (1967); *Schmerber* v. *California*, 384 U.S. 757, 760-765 (1966); *United States* v. *McCarthy*, 473 F.2d 300, 304 n.3 (2d Cir. 1972). Defendant Li Ganoza's Fifth Amendment

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* The full summation passage quoted in Li Ganoza's brief is (Tr. 1630):

> "Now, you have seen Francisco Li Ganoza here in the courtroom and you have heard the evidence in this case. Li Ganoza is, to use the word that has been very overworked in this case, cool. Li Ganoza does not pass the heroin himself, but whenever—if you will think back—whenever his heroin is being passed Li Ganoza is always around, off to the side someplace in the shadows, supervising and making sure that everything goes alright."

privilege did not prohibit the prosecutor from commenting upon what the jury could clearly observe during the course of the trial.

POINT IV

Li Ganoza's membership in the conspiracy was established by a fair preponderance of the independent non-hearsay evidence.

Li Ganoza contends that it was error to admit against him testimony of the various hearsay statements attributed to his co-defendants Lam and Chan since the Government failed to establish his membership in the conspiracy charged by a fair preponderance of the evidence independent of the hearsay utterances of which he complains. *See United States* v. *Geaney*, 417 F.2d 1116 (2d Cir. 1969), *cert. denied sub nom. Lynch* v. *United States*, 397 U.S. 1028 (1970). The contention is in error. The non-hearsay evidence of Li Ganoza's involvement in the conspiracy was more than sufficient to satisfy *Geaney*.

At a meeting on February 22, 1974 Lam told undercover officers Mingo and Wright that he had sent a man, whose name he did not reveal, to Hong Kong to start setting up the 100 pounds of heroin transaction. While, concededly, Lam's statement is hearsay for *Geaney* purposes, the fact that Li Ganoza arrived in Hong Kong two days later where he remained until March 7 when he returned to the United States clearly is not. The sequence of the two events is, circumstantially, some evidence of Li Ganoza's membership in the conspiracy.

Furthermore, Li Ganoza returned to Hong Kong a second time in April, 1974 at almost the same time that

Lam and Chan made the trip to arrange the 100-pound deal. Li Ganoza arrived in Hong ong on April 12—the same day that Lam arrived in Los Angeles on his way to Hong Kong. When a problem arose in Hong Kong on the night that the first ten pounds of heroin were to be delivered to the undercover officers, Li Ganoza accompanied Lam to the officers' hotel room where drug-related discussions ensued in Li Ganoza's presence. While admittedly Li Ganoza's native tongue was Chinese, there was no evidence that he understood no English at all. It is reasonable to infer that he understood at least part of what was said and repudiated none of it. Accordingly, he may be deemed to have adopted certain of Lam's admissions on that occasion. *See United States* v. *Wiley*, 519 F.2d 1348, 1350 (2d Cir. 1975). Moreover, the inference that Li Ganoza's presence on that occasion was for the purpose of assisting the narcotics venture is strengthened by the fact that he left Hong Kong on April 26, 1974 (GX 41)—just three days after the 100-pound deal fell through and the same day that David Chan left Hong Kong.

Back in the United States Li Ganoza twice spoke over the telephone to the undercover agents during the negotiations for the May 30, 1974 sale of heroin. Twice Lam handed the telephone to a man he said was La Ganoza who, on the second occasion, confirmed in broken English Lam's earlier assertion that Li Ganoza's source had gone to Boston (Tr. 784; GX 28-B). Lam's identification of Li Ganoza when handing him the phone may well be a verbal act admissible for *Geaney* purposes against Li Ganoza. *See United States* v. *D'Amato*, 493 F.2d 359, 363-64 (2d Cir.), *cert. denied*, 419 U.S. 826 (1974). Moreover, although the agents could not identify the disembodied voice as Li Ganoza's, the fact that a Chinese-speaking man answered to Li Ganoza's name in this context was circumstantially probative of Li Ganoza's membership in the conspiracy.

Finally, the likelihood that it was indeed Li Ganoza who had spoken to the agents over the telephone was strengthened by the fact that the May 30, 1974 heroin sale—which was the subject of the phone calls in question—took place in Li Ganoza's apartment. Lam took Officer Mingo to the apartment and let himself in with keys, which the jury could have concluded were supplied by Li Ganoza. While this transaction was taking place in the apartment, Lam was standing nearby on a street corner.

While each of the foregoing pieces of proof alone may have been insufficient to satisfy *Geaney*, taken together they more than adequately established Li Ganoza's status as a co-conspirator. See *United States* v. *Blitz*, Dkt. No. 75-1237 (2d Cir. March 25, 1976), slip op 2761, 2785 n.38; *United States* v. *Torres*, 519 F.2d 723, 726 (2d Cir. 1975); *United States* v. *Tramunti*, 513 F.2d 1087, 1108-09 (2d Cir. 1975), *cert. denied*, — U.S. — (1975).

POINT V

The District Court properly admitted Detective Wright's testimony about a marquis reagent test that he performed on a sample of heroin that he received from Jimmy Lam, but which could not be brought to Court from Hong Kong.

Lam claims (Lam Brief at 38-41) that the District Court erred by permitting Detective Wright to testify about a chemical test that he performed in Hong Kong on a sample of heroin that was delivered to him by Jimmy Lam in a Kent cigarette package. Lam claims that Wright should not have been permitted to testify about this chemical test because at the time of trial the heroin was in Hong Kong and not available for defendants to examine, and because Wright was not qualified to per-

form the test. However, these objections, which the defense was allowed to develop during its cross-examination of Wright, go to the weight to be accorded Detective Wright's testimony about the test, not to its admissibility. The Court did not abuse its discretion when it admitted the challenged evidence.

On April 21, 1974, in a Hong Kong hotel room, Jimmy Lam gave Detective Wright a Kent cigarette package that Lam said contained a sample of the heroin that would be contained in the 100 pounds that Lam would be delivering to the undercover agents. The sample was a brown rock substance (Tr. 670). Detective Wright went to the bathroom where he tested the sample with a reagent. When the substance was mixed with the the reagent, the mixture turned dark purple, indicating the presence of heroin in the substance (Tr. 670-75).

Hong Kong law does not permit heroin, such as the sample delivered by Lam, to be taken out of the Colony (Tr. 672).

Detective Wright testified that he had prior experience in applying the test and in checking its results (Tr. 675, 858). During cross-examination of Officer Wright, Lam's counsel attempted to develop the unreliability of the test and Officer Wright's inexperience in performing it (Tr. 854-58).

Proof of Lam's delivery of the sample was offered, not as proof of an independent substantive offense, but simply as an act performed by Lam to advance the conspiracy. It is settled law that the Government may prove the chemical composition of a substance distributed by a defendant as a narcotic by circumstantial evidence. In *United States* v. *Bermudez*, 526 F.2d 89 (2d Cir. 1975), this Court affirmed a narcotics conviction in a case in which the alleged narcotics were not

available at trial and in which there had been no chemical test. The only evidence that showed that the questioned substance was a narcotic was the testimony of a D.E.A. Agent who said he had visually identified the substance as cocaine. Judge Oakes wrote for the Court (*id.* at 97):

> "While chemical analysis of the white powdery substance is doubtless the best basis for expert identification of cocaine, it is not the only basis."

He also noted (*id.* at 98 n.8):

> "The appellants' claim that testimony by a chemist that cocaine cannot be identified by observation made the latter's evidence inadmissible is lacking in merit since it goes only to weight, not admissibility."

See, e.g., United States v. *Atkins*, 473 F.2d 308, 313 (8th Cir.), *cert. denied*, 412 U.S. 931 (1973) (addict permitted to express opinion on whether substance was heroin); *Ewing* v. *United States*, 386 F.2d 10, 15 (9th Cir. 1967), *cert. denied*, 390 U.S. 991 (1968) (testimony about witness' conclusion that she had received marijuana allowed where founded upon prior experience, rolling the cigarette herself, seeing what it looked like, and the fact that it made her "high"); *Agueci* v. *United States*, 310 F.2d 817, 828 (2d Cir. 1962), *cert. denied*, 372 U.S. 959 (1963); *Pennachhio* v. *United States*, 263 F. 66, 67 (2d Cir.), *cert. denied*, 253 U.S. 497 (1920) (upheld a habitual opium user's testimony that the substance given to him, and which he used, was in fact opium).

The only case cited by Lam in support of his contention that Wright's testimony was improper—*United States* v. *Kelly*, 420 F.2d 26 (2d Cir. 1969)—actually supports the Government's position. In *Kelly* the Court of Appeals approved, over defense objection, introduction of evidence of a new type of test—called a neutron acti-

vation test—that had been used by the Government to compare several packages of narcotics. This Court noted that "a strong showing of unreliability must be made in the trial court" (*id.* at 28) to bar admission of evidence about the test.

The marquis reagent test employed here is clearly not unreliable and testimony about its use is frequently received during federal criminal trials. *E.g.*, *United States* v. *Curbelo*, 423 F.2d 1204 (5th Cir. 1970).

This Court in *Kelly*, after holding that evidence about use of the neutron activation test was admissible, discussed the amount of notice given by the Government of its intention to use this novel and complex test. The Court held that the Government had not given the defendants sufficient advance notice of its intention to introduce testimony about the test, particularly because the test's novelty and complexity meant that the defendants would need substantial time to prepare rebuttal testimony. Lam attempts to fit the instant case in the *Kelly* pattern by claiming that the marquis reagent test "was sprung on the defense in the midst of trial" (Lam's Brief at 40). There is no support for this groundless assertion in the record. In fact, the record does not indicate when Lam's counsel first learned about the marquis reagent testimony—probably because the Government had notified the defendants prior to trial, and it was not possible for them to make a record of tardy production. In any case, Lam's counsel undoubtedly first learned about the test long before the federal trial, since Wright testified about the Hong Kong transactions at Lam's earlier state trial in which Lam's counsel participated.

Judge Tenney correctly permitted Officer Wright to testify about the test, and allowed the jury, itself, to decide what weight should be accorded to his testimony.

POINT VI

The District Court properly refused to receive in evidence hearsay documents containing opinions about defendants' ability to complete the Hong Kong transaction and recounting surveillance conducted by Hong Kong authorities.

Defendant Lam complains (Lam Brief at 41-43) of the Court's refusal to permit him to introduce into evidence telexes from Hong Kong "authorities" which described surveillance conducted on the defendants in Hong Kong. The District Court properly refused to receive these hearsay documents in evidence, since they were not business records and did not come within an exception to the hearsay rule.

The telexes in question were written by a Hong Kong D.E.A. agent and recounted what Hong Kong police officers had told the agent about their surveillance of the defendants' activities in Hong Kong.* The telexes also contained an expression of the agent's opinion about whether the defendants would be able to deliver 100 pounds of heroin to the undercover officers in Hong Kong. The telexes were double and single hearsay as to the information attributed to local Hong Kong police authorities and the transmitting agent, respectively. Since neither the surveillance officers nor the agent who expressed the opinion were available to testify and be cross-examined at trial, Judge Tenney properly refused to receive the telexes in evidence. They were not business records, Rule 803(b), Rules of Evidence for United States Courts and Magistrates, and they did not come within any other exception to the hearsay rule. Rule 803, Rules of Evidence for the United States Courts and Magistrates. Moreover, the agent's expressed opinion on the probable success of defendants' venture was on no account admissible in any event.

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* The telexes were marked GX 3509, for identification.

POINT VII

Recordings of New York City hotel-room conversations among David Chan, Jimmy Lam and the undercover officers were properly received in evidence.

David Chan claims that tape recordings of hotel-room conversations among the undercover officers, Jimmy Lam, and himself should have been suppressed, insofar as the tapes recorded Chinese words spoken between Lam and Chan (Chan Brief at 30-38). Chan argues that he and Lam—the only two people in the room who he believed understood Chinese—did not consent to have their Chinese words recorded and had an expectation of privacy as to that portion of their conversation. The claim is groundless both because the defendants waived all expectation of privacy by accurately translating their Chinese words into English for the benefit of the undercover agents and because, as a matter of law, Chan lacked any justifiable expectation of privacy.

On March 12 and 19, 1974, defendants Chan and Lam met with the undercover officers in New York City hotel rooms rented by the officers to discuss the Hong Kong heroin smuggling project. The undercover officers and Lam spoke in English. However, when Chan—who does not speak English well—spoke, it was usually in Chinese, which Lam, in turn, translated into English for the undercover officers. The two hotel-room conversations were recorded by recording devices that law enforcement officers had placed in the rooms before the meetings started. Chan concedes that, to the extent the hotel-room conversations were in English and the undercover officers consented to having them recorded, the defendants had no expectation of privacy and the pertinent English por-

tions of the tapes were admissible in evidence. He claims, however, that he and Lam did expect that the Chinese-language part of their conversations would not be understood by the undercover officers and that, therefore, he and Lam had an expectation of privacy as to those portions of the conversations, which neither participant waived.

Factually the argument is in error since—far from guarding the privacy of the Chinese portion of their conversations—the defendants translated their Chinese words into English for the benefit of the undercover agents. Thus, Chan's assertion (Brief at 31) that he and Lam "sought to attain a measure of privacy" when they talked in Chinese is simply wrong. Chan spoke in Chinese because he could not speak English well, and Lam immediately and correctly translated Chan's Chinese words into English.

Even if Lam had not translated Chan's Chinese words into English, the recording of the Chinese part of their conversation would nonetheless be admissible in evidence because the officers, who were present and who heard the Chinese words, consented to the recording. The rationale for admission of a consensual recording, expressed by Justice Harlan in the leading Supreme Court case, *Lopez* v. *United States*, 373 U.S. 427, 439 (1963), is applicable here:

> "The Government did not use an electronic device to listen in on conversations, it could not otherwise have heard. Instead, the device was used only to obtain the most reliable evidence possible of a conversation in which the Government's own agent was a participant and which that agent was fully entitled to disclose."
>
> * * * * *
>
> "We think the risk that petitioner took in offering a bribe to Davis included the risk that the offer would be accurately reproduced in court, whether by faultless memory or mechanical recording."

Even if, contrary to fact, Lam did not translate Chan's words into English for the officers' benefit, Chan and Lam still took the risk that, contrary to their expectation, the undercover officers could understand Chinese or were sufficiently good linguists to be able thereafter to repeat the Chinese language portion of the conversation between Lam and Chan, as well as the risk that the officers would consent to the challenged conversation, spoken in a room rented by the agents, being overheard by the Government. *United States* v. *Kaufer*, 406 F.2d 550, 551-52 (2d Cir.), *aff'd*, 394 U.S. 458 (1969) (defendant's conversation with government witness overheard by two FBI agents secreted by the witness in his home).

POINT VIII

There was nothing improper about sending copies of transcript-translations of certain recordings into the jury room during trial.

Chan argues that it was error for the Court to permit the jury to have in the jury room, while deliberating, one copy of the transcript of each of the two New York City hotel-room conversations in which Chan participated (Chan Brief at 33-36). This argument is meritless.

When recordings of these conversations—together with transcripts and translations—were received in evidence the Court instructed the jury that the transcripts were received only to assist the jury in listening to and understanding the tapes, which were the best evidence (*E.g.*, Tr. 161, 190, 226, 740). Thereafter, the Court ruled so far in the defendants' favor as to refuse to allow the jury to take copies of the transcripts into the

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* Although most of Chan's contributions to the discussion were in Chinese, he frequently did speak in English during the two meetings (E.g., GX 4-B at Tr. 11, 18, 28-29, 32, 34, 50, 72-73, 75, 89, 91-92, 99-100, 102-105, 107-108, 113, 116-118, 120 and 121).

jury room during deliberations. However, when the jury indicated that it wanted to hear portions of the tapes of these two conversations, the Court asked the forelady to mark, on a single transcript for each conversation, those portions of the tape that the jury wanted to hear (Tr. 1813-14). These single transcripts were not returned to the Court until after the jury announced its verdict. Whether, and to what extent, the jury considered those transcripts while they were in the jury room can only be speculated.

It is clear that the Court could have sent enough copies of the tape transcripts into the jury room so that each juror would have had his own copy of the transcript to review. *United States* v. *Carson*, 464 F.2d 424, 437 (2d Cir.), *cert. denied*, 409 U.S. 949 (1972); *United States* v. *Koska*, 443 F.2d 1167, 1169 (2d Cir.), *cert. denied*, 404 U.S. 852 (1971). Defendant Chan received a more favorable ruling than he would normally be entitled to when, out an excess of caution, the Court did not allow the jury to have copies of the transcripts during its deliberations. There certainly was nothing improper in the Court's decision to send the jury one copy of each transcript for mark-up, particularly since the Court explained that these transcript copies were given to the jury solely to permit it to mark the portions of the recordings it wanted to hear.

CONCLUSION

The judgments of conviction should be affirmed.

Respectfully submitted,

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United States Attorney for the
Southern District of New York,
Attorney for the United States
of America.

JOHN TIMBERS,
Assistant United States Attorney,
Of Counsel.

AFFIDAVIT OF MAILING

State of New York)
: ss.:
County of New York)

John Timbers, being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Southern District of New York.

That on the 8th day of April, 1976 he served a copy of the within Brief by placing the same in a properly postpaid franked envelope addressed:

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And deponent further says that he sealed the said envelope and placed the same in the mail box ~~drop~~ for mailing near the United States Courthouse, Foley Square, Borough of Manhattan, City of New York.

John Timbers

Sworn to before me this

7th day of April, 1976

Jeanette Ann Grayeb

JEANETTE ANN GRAYEB
Notary Public, State of New York
No. 24-1541575
Qualified in Kings County
Commission Expires March 30, 1977